In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 677

MURIEL DODGE NEEMAN (formerly Muriel Dodge Conklin), *Petitioner*

v.

COMMISSIONER OF INTERNAL REVENUE

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Tax Court (R. 49-52) is reported at 13 T. C. 397. The *per curiam* opinion of the Court of Appeals (R. 63-64) is reported at 200 F. 2d 560.

JURISDICTION

The judgment of the Court of Appeals was entered on December 30, 1952. (R. 65.) The petition for a writ of certiorari was filed on March 27,

1953. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

QUESTIONS PRESENTED

1. Whether certain payments made to taxpayer by her former husband pursuant to an agreement which was incorporated in a decree of divorce, constituted income to taxpayer under Section 22(k) of the Internal Revenue Code.

2. Whether taxpayer was entitled under Section 25(b)(1) of the Internal Revenue Code to an exemption as the head of a family during the year 1942.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the statute and regulations involved are set forth in the Appendix, *infra*, pp. 13-23.

STATEMENT

The facts were largely stipulated and the findings of the Tax Court may be summarized as follows (R. 50-51):[1]

Petitioner (the taxpayer) and Horace E. Dodge were married on May 17, 1928. They entered into an agreement on August 4, 1933. That agreement was not entered into incident to any divorce. It recited that the couple had two children, one born in 1930 and the other in 1932. The parties were living apart, and the agreement was to settle

[1] The stipulation of facts (R. 25-48) was incorporated in the Tax Court's findings by reference.

property rights and provide financially for the wife and children. It required the husband to make periodic payments to the wife of $24,000 annually until one of several specified events should occur. (R. 50.)

The taxpayer and Dodge entered into another agreement on October 23, 1939.[2] This agreement was incident to a divorce obtained by the taxpayer from Dodge on October 26, 1939. The agreement of October 23, 1939, provided that "The original Agreement dated August 4, 1933, * * * remains unchanged and in full force and effect, except as follows:". A change, material to the present proceeding, was an increase, from $24,000 annually to $30,000 annually, of the amount payable until the taxpayer remarried and an increase, from $7,500 to $15,000 annually, of the amount payable by Dodge to her after she remarried. The agreement of October 23, 1939, contained the following provision (R. 50):

> These modifications shall only become effective upon approval thereof by the Circuit Court for the County of Wayne, in Chancery, and of the entry of a decree for divorce in re *Dodge* v. *Dodge,* No. 277,960 on or before November 15, 1939, and upon such decree entered by said Court in said cause becoming final and unappealable.

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[2] The original agreement and pertinent amendments were annexed to the stipulation of facts (26-44).

The final decree of divorce, entered October 26, 1939, approved, ratified and confirmed the agreement of August 4, 1933, as amended by the agreement of October 23, 1939, covering property rights, custody and support of the children and provisions for the wife. (R. 50.)

The taxpayer received $15,000 from Dodge in 1942 and 1943 in accordance with the above-mentioned agreements and decree. (R. 51.)

The taxpayer also received $750 per month from Dodge during 1942 for the support, maintenance and education of their two children. She maintained a house, sent the children to school, and did everything else that was necessary for them during 1942, spending most of the money received from Dodge on their education and maintenance. The children were under her custody during all of 1942. The record does not show how much, if any, of her own money was spent by the taxpayer during 1942 for the support or education of the two children. (R. 51.)

The Commissioner, in determining the deficiency, included $15,000 in the taxpayer's income for each of the years 1942 and 1943 with the explanation that it represented alimony taxable to her under Section 22(k). He also held that she was not head of a family during 1942 within Section 25(b)(1) and reduced her personal exemption from $1,200 claimed to $500 allowed. (R. 51.)

The Tax Court held that the payments in question were includible in the taxpayer's income under Section 22(k) of the Internal Revenue Code (R. 51-52), and that the taxpayer was not entitled to an exemption as the head of a family during the year 1942 (R. 52). The Court of Appeals for the Second Circuit affirmed. (R. 63-64.)

ARGUMENT

Both of the courts below correctly held (R. 51-52, 63-64) that taxpayer was accountable under Section 22(k) of the Internal Revenue Code, *infra*, pp. 13-15, for the payments in question and that she was not entitled under Section 25(b)(1) of the Code, *infra*, pp. 15-16, to an exemption as the head of a family during 1942.

1. Section 22(k) provides that, in the case of a wife who is divorced or legally separated from her husband under a decree of divorce or of separate maintenance, periodic payments received subsequent to such decree in discharge of a legal obligation which because of the marital or family relationship is imposed upon or incurred by such husband under such decree or under a written instrument incident to such divorce or separation shall be includible in the gross income of such wife.

In the instant case, the taxpayer and Dodge were divorced in 1939 and he paid her $15,000 annually for her support in 1942 and 1943. Those

amounts were received in discharge of a legal obligation which, because of the marital or family relationship, was imposed upon Dodge under the agreement of the parties as amended only three days prior to the granting of the divorce. The agreement, as amended, which was incorporated into the divorce decree, was clearly incident to the divorce and it is immaterial whether or not the original agreement, made in 1933, was incident thereto.[3] In the circumstances, all the requirements of Section 22(k) for taxing the payments to the wife were satisfied.

The decision of the court below is in harmony with and is supported by the following authorities: *Lerner* v. *Commissioner,* 195 F. 2d 296 (C.A. 2); *Smith* v. *Commissioner,* 192 F. 2d 841 (C.A. 1); *Mahana* v. *United States,* 115 C. Cls. 716, certiorari denied, 339 U. S. 978; *Cox* v. *Commissioner,* 176 F. 2d 226 (C. A. 3); *Feinberg* v. *Commissioner,* 198 F. 2d 260 (C. A. 3); *Commissioner* v. *Miller,* 199 F. 2d 597 (C. A. 9). We have found no decision to the contrary.

Taxpayer contends (Pet. p. 10) that because the agreement required Dodge to make payments

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[3] We do not, however, concede the correctness of the Tax Court's finding that the 1933 agreement was not entered into incident to any divorce. This agreement was complete and comprehensive; it included provisions which only became effective in the event of taxpayer's remarriage (R. 28, 35, 40), and it contained references to possible future court proceedings affecting the matrimonial situation of the parties (R. 32). In the circumstances, it would be reasonable to conclude that this agreement was entered into in contemplation of and incident to a divorce. See *Lerner* v. *Commissioner,* 195 F. 2d 296 (C. A. 2).

to her even after her remarriage such payments were beyond the scope of any obligation of Dodge that the local state divorce court could impose in the absence of the specific promises contained in the agreement.[4] The argument is pointless, for the impact of the local law on the state court's inclusion of the agreement in the alimony portion of the divorce decree makes the agreement no less a written instrument incident to a divorce. In any event, the application of Section 22(k) does not depend upon state laws. *Cox* v. *Commissioner, supra.* The periodic payments involved here derive from the agreement, which was made a part of the divorce decree, and that agreement "was a specification of method for the performance of the husband's obligation of support" (*Buchanan* v. *United States,* 164 F. 2d 710, 714 (C.A.D.C.), which obligation unquestionably existed at the time the agreement was made. Hence, the payments were in the nature of alimony and were well within the purview of Section 22(k).

Taxpayer urges (Pet. pp. 10-15) that since Dodge agreed to pay income taxes on the amounts he was to pay her, he is foreclosed from taking a deduction under Section 23(u), *infra,* p. 15, and

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[4] It is not clear that the Michigan state courts have no jurisdiction to enter a divorce decree awarding alimony to the wife after her remarriage, where the parties agree to the embodiment of that arrangement in the decree. We find nothing in the Michigan statutes forbidding it, and the Supreme Court of Michigan has held that remarriage does not *ipso facto* annul a decree awarding alimony. *Herman* v. *Wayne Circuit Judge,* 236 Mich. 604, 609.

that there is no basis for taxing the payments to her under Section 22(k).[5] The argument ignores the established rule that the parties to a contract can not fix the tax consequences to suit themselves. *Wright* v. *Commissioner,* 50 F. 2d 727 (C.A. 4), certiorari denied, 284 U. S. 652. We think the Tax Court, in the instant case, was correct in disposing of taxpayer's contention, as follows (R. 52):

> The petitioner also makes an argument based upon a provision in the agreement that Dodge would pay any Federal taxes which might be due on moneys received by the petitioner from him. That provision is not binding upon the Commissioner of Internal Revenue and can not prevent him from deter-

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[5] Taxpayer appears to be in error in stating (Pet. p. 14) that there was no showing in *Lerner* v. *Commissioner, supra,* relied upon by the court below (R. 64), that Lerner ever agreed to pay income taxes on the sums he paid to his wife. See *Lerner* v. *Commissioner,* 15 T. C. 379, wherein the dissenting judge in the Tax Court said (p. 388):

> It may be a factor in the conclusion of the majority of the Court that the petitioner agreed in the agreement of October 20, 1936, that the support payments which he would pay to Mrs. Lerner would be free and clear from any state or Federal tax in existence or enacted thereafter. This element should not, in my opinion, weigh in either direction. It is simply a contractual provision which calls for some adjustment in the amounts of the payments in the event Mrs. Lerner is taxable upon them. The intention of the Congress in enacting sections 22 (k) and 23 (u) is clear. The Congress intended that the party receiving alimony should include it in income for taxation, and that the person paying alimony should receive a deduction. If the parties choose to make some adjustment between themselves, one compensating the other for the tax paid, such arrangement is not grounds for holding that the provisions of the statute do not apply.

mining the amount of taxes due under the Internal Revenue Code from the taxpayer. *Frank R. Casey,* 12 T. C. 224; *John H. Humbert,* 24 B.T.A. 828. Cf. *Old Colony Trust Co.* v. *Commissioner,* 279 U. S. 716; *Phillips* v. *Commissioner,* 283 U. S. 589.

Taxpayer's contention (Pet. pp. 15-17) that Section 22(k), if construed to be applicable to the amounts received by her under the agreement, is invalid under the Fifth and Sixteenth Amendments to the United States Constitution, does not warrant extended discussion.[6] The validity of Section 22(k), under the Sixteenth Amendment, when applied to payments received by a wife subsequent to a divorce under an agreement entered into prior to the entry of the divorce decree, was upheld in *Mahana* v. *United States,* 115 C. Cls. 716, certiorari denied, 339 U. S. 978. And there is obviously no sound basis for the contention that to apply Section 22(k) to the amounts received by taxpayer from her former husband in lieu of alimony would render the Section invalid, under the Fifth Amendment, as one that impairs the obligation of an existing contract, merely because her former husband agreed with *her* to pay the income taxes accruing on the amounts he paid her.

[6] The Tax Court declined to consider the constitutional question because it had not been specifically pleaded in that court (R. 52), and the Court of Appeals did not mention the question in its *per curiam* opinion (R. 64).

2. Taxpayer also contends that she should have been allowed a personal exemption of $1,200 for the year 1942 as the head of a family.

Section 25(b)(1) of the Internal Revenue Code, infra, pp. 15-16, provided for a personal exemption of $1,200 during the year 1942 in the case of the head of a family. That Section was implemented by Treasury Regulations 111, Section 29.25-4, *infra,* pp. 22-23, which defines the head of a family as an individual who actually supports and maintains in one household one or more individuals who are closely connected with him by blood relationship, relationship by marriage, or by adoption, and whose right to exercise family control and provide for these dependent individuals is based upon some moral or legal obligation.

In the instant case the Commissioner determined (R. 10) that taxpayer was not the head of a family during 1942 within the meaning of Section 25(b)(1) of the Code. The Commissioner's determination is presumptively correct and the taxpayer has the burden of proving it to be wrong. *Welch* v. *Helvering,* 290 U. S. 111, 115. In order to discharge that burden, it was incumbent upon the taxpayer here to show that she substantially contributed to the support of the two children. *Commisioner* v. *Murray,* 174 F. 2d 816 (C. A. 2d); *Mack* v. *Commissioner,* 37 B.T.A. 1101; *Carson* v. *Commissioner,* 47 B.T.A. 163. She failed to show that she had supported the children substantially

from her personal funds as opposed to those furnished by Dodge for the express purpose, or that the children were dependent individuals within the meaning of the Regulations. She received $750 per month from Dodge during 1942 for the support and maintenance and education of the children (R. 51). The record does not show how much, if any, of her own money was spent by taxpayer in 1942 for their support or education, or that she expended any amount in excess of the $750 per month paid to her by Dodge for that purpose. Her claim (Pet. pp. 17-18) that she contributed substantially to the support of the children is not borne out by her testimony (R. 20-22) which was too vague to justify a finding to that effect. Consequently, the courts below had no alternative to the denial of her claim to exemption as the head of a family during the year 1942.

CONCLUSION

The decision of the court below is clearly correct, there are no conflicts of decision, and further review is not warranted. The petition for a writ of certiorari should, therefore, be denied.

Respectfully submitted,

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APRIL, 1953.

APPENDIX

Internal Revenue Code:

SEC. 22. GROSS INCOME.

* * *

(k) [as added by Sec. 120(a) of the Revenue Act of 1942, c. 619, 56 Stat. 798] *Alimony, Etc., Income.*—In the case of a wife who is divorced or legally separated from her husband under a decree of divorce or of separate maintenance, periodic payments (whether or not made at regular intervals) received subsequent to such decree in discharge of, or attributable to property transferred (in trust or otherwise) in discharge of, a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by such husband under such decree or under a written instrument incident to such divorce or separation shall be includible in the gross income of such wife, and such amounts received as are attributable to property so transferred shall not be includible in the gross income of such husband. This subsection shall not apply to that part of any such periodic payment which the terms of the decree or written instrument fix, in terms of an amount of money or a portion of the payment, as a sum which is payable for the support of minor children of such husband.

In case any such periodic payment is less than the amount specified in the decree or written instrument, for the purpose of applying the preceding sentence, such payment, to the extent of such sum payable for such support, shall be considered a payment for such support. Installment payments discharging a part of an obligation the principal sum of which is, in terms of money or property, specified in the decree or instrument shall not be considered periodic payments for the purposes of this subsection; except that an installment payment shall be considered a periodic payment for the purposes of this subsection if such principal sum, by the terms of the decree or instrument, may be or is to be paid within a period ending more than 10 years from the date of such decree or instrument, but only to the extent that such installment payment for the taxable year of the wife (or if more than one such installment payment for such taxable year is received during such taxable year, the aggregate of such installment payments) does not exceed 10 per centum of such principal sum. For the purposes of the preceding sentence, the portion of a payment of the principal sum which is allocable to a period after the taxable year of the wife in which it is received shall be considered an installment payment for the

taxable year in which it is received. (In cases where such periodic payments are attributable to property of an estate or property held in trust, see section 171(b).)

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(26 U.S.C. 1946 ed., Sec. 22.)

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * *

(u) [as added by Sec. 120(b) of the Revenue Act of 1942, *supra*] *Alimony, Etc., Payments.*—In the case of a husband described in section 22(k), amounts includible under section 22(k) in the gross income of his wife, payment of which is made within the husband's taxable year. If the amount of any such payment is, under section 22(k) or section 171, stated to be not includible in such husband's gross income, no deduction shall be allowed with respect to such payment under this subsection.

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(26 U.S.C. 1946 ed., Sec. 23.)

SEC. 25. CREDITS OF INDIVIDUAL AGAINST NET INCOME.

* * *

(b) *Credits for Both Normal Tax and Surtax.*—There shall be allowed for the purposes of the normal tax and the surtax the following credits against net income:

(1) [as amended by Sec. 131 of the Revenue Act of 1942, *supra*] *Personal Exemption.*—In the case of a single person or a married person not living with husband or wife, a personal exemption of $500; or in the case of the head of a family or a married person living with husband or wife, a personal exemption of $1,200. A husband and wife living together shall receive but one personal exemption. The amount of such personal exemption shall be $1,200. If such husband and wife make separate returns, the personal exemption may be taken by either or divided between them.

* * *

26 U.S.C. 1946 ed., Sec. 25.)

Treasury Regulations 111, promulgated under the Internal Revenue Code:

SEC. 29.22(k)-1. *Alimony and Separate Maintenance Payments—Income to Former Wife.*—(a) *In general.*—Section 22(k) provides rules for treatment in certain cases of payments in the nature of or in lieu of alimony or an allowance for support as between

spouses who are divorced or legally separated under a court order or decree. For convenience, the payee spouse will hereafter in this section of the regulations be referred to as the "wife" and the spouse from whom she is divorced or legally separated as the "husband." See section 3797(a)(17).

In general, section 22(k) requires the inclusion in the gross income of the wife of periodic payments (whether or not made at regular intervals) received by her after the decree of divorce or of separate maintenance. Such periodic payments may be received from either of the two following sources:

(1) In discharge of a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by the husband, or

(2) Attributable to property transferred (in trust or otherwise) in discharge of a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by the husband.

The obligation of the husband must be imposed upon him or assumed by him (or made specific) under either of the following:

(1) A court order or decree divorcing or legally separating the husband and wife, or

(2) A written instrument incident to such divorce or legal separation.

The periodic payments received by the wife attributable to property so transferred and includible in her income are not to be included in the gross income of the husband. See also section 29.171-1 in cases where such periodic payments are attributable to property held in trust.

The purpose and effect of section 22(k) may be illustrated, in general, by the following examples, in which it is assumed that the husband and wife make their income tax returns on the calendar year basis:

Example (1). W sues H for divorce in 1942. The court awards W temporary alimony of $25 a week pending the final decree. On September 1, 1942, the court grants W a divorce and awards her $200 a month permanent alimony. No part of the $25 a week temporary alimony received prior to the decree is includible in W's income under section 22(k), but the $200 a month received during the balance of 1942 by W is includible in her income for 1942. Under section 23(u), H is entitled to deduct such $200 payments from his income.

Example (2). W files suit for divorce from H. In consideration of W's promise to re-

linquish all marital rights and not to make public H's financial affairs, H makes a legally binding promise in writing to W to pay to her $200 a month if a final decree of divorce is granted without any provision for alimony. Accordingly, W does not request alimony and no provision for alimony is made under a final decree of divorce entered prior to 1942. During 1942, H pays W $200 a month, pursuant to the promise. The $2,400 thus received by W is includible in her gross income under the provisions of section 22(k). Under section 23(u), H is entitled to a deduction of $2,400 from his gross income.

Example (3). H and W enter into an antenuptial agreement, under which, in consideration of W's relinquishment of all marital rights (including dower) in H's property, and, in order to provide for W's support and household expenses, H promises to pay W $200 a month for her life. Ten years after their marriage, W sues H for divorce but does not ask for or obtain alimony because of the provision already made for her support in the antenuptial agreement. Likewise, the divorce decree is silent as to such agreement and H's obligation to support W. Section 22(k) does not apply to such a case. If, however, the decree were modified so as to refer

to the antenuptial agreement, or if, at the time of the divorce, reference had been made to the antenuptial agreement in the court's decree or in a written instrument incident to the divorce, section 22(k) would require the inclusion of the payments received by W after the decree in her income for taxable years beginning after December 31, 1941. (As to including such payments in the wife's income, if made by a trust created under the antenuptial agreement, regardless of whether referred to in the decree or a later instrument, see section 29.171-1.)

Section 22(k) applies only where the legal obligation being discharged arises out of the family or marital relationship in recognition of the general obligation to support, which is made specific by the instrument or decree. Thus, section 22(k) does not apply to that part of any periodic payment which is attributable to the repayment by the husband of, for example, a *bona fide* loan previously made to him by the wife, the satisfaction of which is specified in the divorce decree as a part of the general settlement between the husband and wife.

* * *

(d) *Payments for support of minor children.*—Section 22(k) does not apply to that

part of any periodic payment which, by the terms of the decree or the written instrument under section 22(k), is specifically designated as a sum payable for the support of minor children of the husband. The statute prescribes the treatment in cases where an amount or portion is so fixed but the amount of any periodic payment is less than the amount of the periodic payment specified to be made. In such cases, to the extent of the amount which would be payable for the support of such children out of the originally specified periodic payment, such periodic payment is considered a payment for such support. For example, if the husband is by terms of the decree required to pay $200 a month to his divorced wife, $100 of which is designated by the decree to be for the support of their minor children, and the husband pays only $150 to his wife, $100 is nevertheless considered to be a payment by the husband for the support of the children. If, however, the periodic payments are received by the wife for the support and maintenance of herself and of minor children of the husband without such specific designation of the portion for the support of such children, then the whole of such amounts is includible in the income of the wife as provided in section 22(k). Except in cases of a designated amount or por-

tion for the support of the husband's minor children, periodic payments described in section 22(k) received by the wife for herself and any other person or persons are includible in whole in the wife's income, whether or not the amount or portion for such other person or persons is designated. As to treatment of such amounts with respect to credit for dependents and head of family exemption, see sections 25(b)(2)(A) and 401(a)(2) and sections 29.25-4 and 29.25-6.

SEC. 29.25-4. *Personal Exemption of Head of Family.*—A head of a family is an individual who actually supports and maintains in one household one or more individuals who are closely connected with him by blood relationship, relationship by marriage, or by adoption, and whose right to exercise family control and provide for these dependent individuals is based upon some moral or legal obligation. In the case of spouses who are divorced or legally separated under a decree of divorce or of separate maintenance, periodic payments (in the nature of, or in lieu of, alimony or an allowance for support) received by one spouse which she is required under section 22(k) or section 171(a) to include in her gross income and which she uses for support of dependents are considered payments by her for such support and not

payments by the other spouse for support of any person. In the absence of continuous actual residence together, whether or not a person with dependent relatives is a head of a family within the meaning of the Internal Revenue Code must depend on the character of the separation. If a father is absent on business, or a child or other dependent is away at school or on a visit, the common home being still maintained, the additional exemption applies. If, moreover, through force of circumstances a parent is obliged to maintain his dependent children with relatives or in a boarding house while he lives elsewhere, the additional exemption may still apply. If, however, without necessity the dependent continuously makes his home elsewhere, his benefactor is not the head of a family, irrespective of the question of support. A resident alien with children abroad is not thereby entitled to credit as the head of a family. As to the amount of the exemption, see section 29.25-3.

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